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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/086,532	02/28/2002	Michael Kauschke	34303/48	3809
7590	10/22/2003		EXAMINER	
Neal L. Rosenberg, Esq. AMSTER, ROTHSTEIN & EBENSTEIN 90 Park Avenue New York, NY 10016			WATKINS III, WILLIAM P	
			ART UNIT	PAPER NUMBER
			1772	
DATE MAILED: 10/22/2003				

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Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application N .</b>	<b>Applicant(s)</b>
	10/086,532	KAUSCHKE ET AL
	<b>Examiner</b> William P. Watkins III	<b>Art Unit</b> 1772

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 21 July 2003.

2a) This action is FINAL.                    2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-73,75-95 and 101-108 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1-73,75-95 and 101-108 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

#### Priority under 35 U.S.C. §§ 119 and 120

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) All b) Some \* c) None of:  
1. Certified copies of the priority documents have been received.  
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) The translation of the foreign language provisional application has been received.

15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

#### Attachment(s)

1) Notice of References Cited (PTO-892)                    4) Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_.  
2) Notice of Draftsperson's Patent Drawing Review (PTO-948)                    5) Notice of Informal Patent Application (PTO-152)  
3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_.                    6) Other:

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#### DETAILED ACTION

1. The rejections over McCormack et al. are withdrawn in view of applicant's amendment to the claims limiting them to wovens and nonwovens (the examiner constructs nonwovens as being textiles or fabrics with fibers or filaments with no woven structure and not simply a solid film which has no type of woven structure). The examiner agrees that that McCormack et al. teaches a film structure.

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

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3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 1-73, 75-95, 101-108 are rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Ciampaichella et al. (U.S. 6,436,508 B1).

See the abstract, which teaches a breathable barrier layer with an attached expandable second material layer. The breathable layer is considered as apertured, but the term apertured sheet is defined broadly in the specification as including fibrous wovens and nonwovens as well as microporous film (col. 7, lines 45-55), with microscopic apertures (col. 7, line 60 through col. 8, lines 15). Pores are generally defined as microscopic openings. See the coated layers in Example 1, which recites nonwovens with no specific recited apertures. The examiner takes the openings between the fibers as being the

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apertures or pores of the nonwoven fabric. Coating within the apertures within the breathable sheet is taught as an option (col. 4, lines 1-15, which defines the inner surface as the aperture defined between the garment facing and wearer facing surfaces). This meets the instant language of instant claim 67, which requires the second expandable material being within the first material. The expandable material may also between two layers as in Example 1, which meets the language of instant claim 1. The instant claims call for specific MVTR and air permeability rates. As the reference teaches the same properties of permeability and structure it is presumed that the numerical rates of the claims are met as the PTO does not have the ability to run comparative tests. See MPEP 2112.

5. --Claims 1-33, and 101-103 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Gegelys (U.S. 4,643,726).

See col. 2, lines 30-50, which teaches an expandable layer sandwiched between two outer layers in order to from a barrier layer. The instant claims call for specific MVTR and air permeability rates. As the reference teaches the same properties of permeability and structure it is presumed that the

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numerical rates of the claims are met as the PTO does not have the ability to run comparative tests. See MPEP 2112.

6. Applicant's arguments filed 21 July 2003 have been fully considered but they are not persuasive.

Applicant argues regarding Ciammaichella et al. that the reference recites apertures and not the instantly claimed pores. As noted in the above rejection, the reference defines apertures broadly to include woven and nonwoven fabrics as well as microporous films, which have pores. Regarding Gegelys, applicant argues that the apertures (element 26) are larger than the instantly claimed pores. The examiner agrees with this statement, but does not agree that it overcomes the reference. Gegelys teaches paper layers for the barrier layer, which are porous due to their fibrous structure (col. 2, lines 36-45).

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Nothing in the instant claim language explicitly excludes larger apertures as long as the layer also has pores. The paper layers meet the pore limitation.

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to William P. Watkins III whose telephone number is 703-308-2420. The examiner works an increased flex time schedule, but can normally be reached Monday through Friday, 11:30 A.M. through 8:00 P.M. Eastern Time. The examiner returns all calls within one

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business day unless an extended absence is noted on his voice mail greeting.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon can be reached on 703-308-4251. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9310 for regular communications and 703-872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0651.



WW/ww

October 20, 2003

WILLIAM P. WATKINS III  
PRIMARY EXAMINER